S259011

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G.,	)	
	)	
Petitioner,	)	B295555
	)	
v.	)	Ventura County
	)	Superior Court
THE SUPERIOR COURT OF VENTURA CO.,	)	No. 2018017144
	)	
Respondent;	)	
	)	
THE PEOPLE OF THE STATE OF CALIF.	)	
	)	
Real Party in Interest.	)	
	)	

The Honorable Kevin J. McGee, Judge Presiding

PETITION FOR REVIEW

RICHARD LENNON
Executive Director

*JENNIFER HANSEN
Staff Attorney SBN 249733

CALIFORNIA APPELLATE PROJECT
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071
Telephone: (213) 243-0300
Fax: (213) 243-0303
Email: Jennifer@lacap.com

Attorneys for Petitioner

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATE CONSTITUTION

Articles:

STATE STATUTES

Penal Code section:

Welfare & Institutional Code sections:

CALIFORNIA RULES OF COURT

Rules:

LEGISLATIVE MATERIAL

PROPOSITIONS

OTHER MATERIAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G.,	)	
	)	
Petitioner,	)	B295555
	)	
v.	)	Ventura County
	)	Superior Court
THE SUPERIOR COURT OF VENTURA CO.,	)	No. 2018017144
	)	
Respondent;	)	
	)	
THE PEOPLE OF THE STATE OF CALIF.	)	
	)	
Real Party in Interest.	)	
	)	

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner O.G., respectfully requests that this Court grant review following a published opinion from the Court of Appeal, Second Appellate District, Division Six, filed on September 30, 2019, finding Senate Bill (SB) 1391, passed by the Legislature and signed by the Governor, unconstitutional. (Cal. Rules of Court, rule 8.500(b)(1).) As will be explained below, the Opinion relies on an erroneous application of this Court's prior case law and, more importantly, creates a split of authority in the

California Courts of Appeal as to the constitutionality of SB 1391.

A copy of the published opinion is attached hereto as Appendix A. An Order Modifying Opinion, but not the judgment, is attached as Appendix B.

NECESSITY FOR REVIEW & QUESTION PRESENTED

This Court should grant review in this case to secure uniformity of decision and to settle an important question of law: whether SB 1391 is constitutional. (Cal. Rules of Court, rule 8.555(b)(1).) SB 1391 passed the Legislature by a majority vote and took effect on January 1, 2019. The law prevents proescutors from moving to transfer minors to adult court where the minor was 14 or 15 years old at the time of the criminal offense. (Stats. 2018, ch. 1012, § 1 [enacting SB 1391]; see Cal. Const., art. IV, § 8.)

Petitioner is accused of committing two murders in 2018 when he was 15 years old. The constitutionality of SB 1391 determines whether petitioner is eligible to be tried as an adult and sent to adult prison if convicted or whether he will be adjudicated in juvenile court with the opportunity to receive rehabilitative services in that system.

To date, in published cases, five Courts of Appeal have found SB 1391 is a constitutional legislative amendment to Proposition 57, "The Public Safety and Rehabilitation Act of 2016." Proposition 57 included an amendment clause which

allows legislative amendments to the "Judicial Transfer Process" that "are consistent with and further the intent of this act." The amendment clause is to be "broadly construed to accomplish its purposes." (Prop. 57, § 5.) Assessing Proposition 57's ballot materials and the history of juvenile law in California, each of the five Courts of Appeal have found SB 1391 satisfies this amendment clause. (*People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994 [First Dist., Div. 4]; *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529 [Third Dist.]; *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360 [Fifth Dist.]; *People v. Superior Court (I.R.)* (2019) 38 Cal.App.5th 383 [Fifth Dist.]; *People v. Superior Court (S.L.)* (2019) 40 Cal.App.5th 114 [Sixth Dist.]; *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742 [Fourth Dist., Div. 2].)

In contrast, here, Division Six of the Second District never specifically addressed the fact that Proposition 57 has an amendment clause, did not consider the ballot materials or the "history of how 15-year-old alleged murderers have historically been treated" (Appendix A: Opinion, pg. 4) and found SB 1391 unconstitutional. (*O.G. v. Superior Court* (2019) 40 Cal.App.5th

626.)

The *O.G.* Court disparages other Courts of Appeal for not citing People v. Superior Court (Pearson) (2010) 48 Cal.4th 564, 571 (Pearson) (Appendix A: Opinion, pg. 4). The O.G. Court held that, under Pearson, if a new law does not allow something that an initiative did allow, then the new law is unconstitutional. But contrary to the O.G. Court's truncated analysis, Pearson does not prevent a finding that SB 1391 is a lawful legislative amendment. The O.G. Court misconstrued Pearson.

In Pearson, this Court recognized that the Legislature can still make laws in areas where there is an existing initiative. Not all legislation that addresses the same subject matter as an initiative, or even augments its provisions, is an amendment to the initiative. (*Id.* at 571.) In *Pearson,* Justice Chin enumerated a helpful test to aid reviewing courts in determining if new legislation is an amendment to the initiative or not. If the answer to the *Pearson* test is that the new law can be considered an amendment, then the next step is to determine whether the amendment satisfies the amendment clause of the prior passed Proposition. This is the way all of the other Courts of Appeal that

have considered the issue have analyzed the question. Contrary to the holding of the *O.G.* Court, if a new law prevents something that a proposition allows, the reviewing court is not required under *Pearson* or *stare decisis* to invalidate the new law. (Appendix A: Opinion, pg. 4.)

In short, this Court should grant review and intervene to correct the *O.G.* Court's erroneous analysis of the issue, resolve the state-wide split of authority and ultimately determine whether SB 1391 is constitutional.[1] Today, individual trial courts are free to "make a choice between the conflicting decisions" as to whether or not 14- and 15-year-old juveniles can be punished in adult court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) This situation is untenable, leading to unpredictable and divergent results for juvenile offenders across the state.

[1] While the split of authority could be cured with depublication of the outlier Opinion, that result will not benefit petitioner as he will still face potential prosecution as an adult if this ruling is allowed to stand.

STATEMENTS OF CASE AND FACTS

Petitioner is accused of killing two people in 2018 when he was 15 years old. (Exhibit A[2], pgs. 5-7.) In 2018, the Ventura County District Attorney moved to transfer petitioner to adult court. On January 1, 2019, SB 1391 became operative. The trial court did not rule on the transfer motion. On January 31, 2019, after reviewing briefing from both parties, the trial court ruled that SB 1391 was unconstitutional. (Exhibit G, pgs. 132-135.) Proceedings in the case in the trial court are currently stayed.

Contrary to the case history as described in the Opinion (Appendix A), as observed by the Court of Appeal's Order Modifying Opinion, filed on October 22, 2019, the trial court below had not "approved the district attorney's request to try petitioner as an adult." (Appendix A & B.)

---

[2]Exhibits In Support of Petition for Writ of Mandate, filed in Second District, Division Six, on May 2, 2019.

ARGUMENT

SB 1391 IS CONSTITUTIONAL

A. Introduction and Argument Summary

SB 1391 is constitutional, lawfully-enacted legislation that prohibits the prosecution of 14- and 15-year-old children in adult court. SB 1391 is either a lawful exercise of legislative power to amend the existing Welfare and Institutions Code section 707 or it is a lawful amendment to Proposition 57. Either way it is constitutional.

First, SB 1391 is constitutional as a lawful modification of a change the Legislature made in 1994 with Assembly Bill (AB) 560 which modified Welfare and Institutions Code section 707. In response to public concern about juvenile crime at the time, elected officials approved AB 560 to decrease the minimum age for adult prosecution from 16 to 14. Now 25 years later, in response to the public's evolving views on juvenile justice, relying on the same legislative power they used before, with the passage of SB 1391, elected officials have returned the minimum age for adult prosecutions to 16.

Second, SB 1391 is an amendment to Proposition 57 that satisfies its amendment clause, which explicitly allows changes to the "Judicial Transfer Process." On this basis, the majorities of five Courts of Appeal have found SB 1391 constitutional.

Ultimately, whether this Court finds SB 1391 is an amendment to Proposition 57, it is lawful and constitutional. The Court of Appeal's ruling must be reversed and petitioner's case must be adjudicated in juvenile court where, if the petition is sustained, petitioner will be given a juvenile disposition.

B. Text of the New Law

After passing both houses of the Legislature by a majority vote, Governor Brown signed SB 1391 into law on September 30, 2018. Effective on January 1, 2019, SB 1391 amended Welfare and Institutions Code section 707, subdivision (a)(1), to read:

> (1) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any offense listed in subdivision (b) or any other felony criminal statute, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. . . . [] (2) In any case in which an individual is alleged to be a person described in Section 602 by reason of the violation, when he or she

> was 14 or 15 years of age, of any offense listed in subdivision (b), but was not apprehended prior to the end of juvenile court jurisdiction, the district attorney or other appropriate prosecuting officer may make a motion to transfer the individual from juvenile court to a court of criminal jurisdiction. (Stats. 2018, ch. 1012, § 1, Exhibit C, pg. 80.)

C. SB 1391 Is Constitutional Because It Was A Lawful Change to the Welfare and Institutions Code Which Set 14 As The Minimum For Adult Court Prosecutions Almost 25 Years Ago With AB 560

As recently observed, "The practice of allowing certain 14 and 15 year olds to be prosecuted in criminal court is not an 'actual change[]' wrought by Proposition 57, but a continuation of prior practice. More than 20 years before Proposition 57, the Legislature lowered the age at which a minor could be prosecuted in criminal court in California, from 16 to 14 years old. . . There the minimum age remained, for minors accused of serious or violent crimes, until Senate Bill 1391." (*People v. Superior Court (Alexander C.), supra*, 34 Cal.App.5th at 1002.) Prior to 1995, Welfare and Institutions Code section 707 authorized the trial court to find some minors age 16 or older should be eligible to be tried in adult court. Effective January 1995, AB 560 authorized the prosecution of some 14- and 15-year-old children in adult court pursuant to criteria regarding the offense committed and

amenability to rehabilitation in juvenile court. (Welf. & Inst. Code, § 707, subds. (d)(2); See AB 560 (1993-1994 Reg. Sess.), as amended Aug. 26, 1994.)

With the passage of AB 560 in 1994, "[t]he Legislature opened the door of the criminal courthouse to these younger [14- and 15-year-old] offenders." (*Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649, 1652.) In a challenge to the "constitutionality of the statutory framework" for certifying 14- and 15-year-olds for trial as adults, the Court of Appeal held that the Legislature's change to the law via AB 560 was constitutional. (*Id.* at 1661.) The *Hicks* Court noted that AB 560 was a "reaction to legitimate public anxiety about the increase in juvenile crime in terms of numbers and violence" and that allowing the possibility of adult treatment for certain 14- and 15-year-old juvenile offenders was a "proper exercise of legislative power." (*Id.* at 1658, 1660.)

Similarly, SB 1391 is a proper exercise of legislative power in response to the public's rejection of adult punishment options for younger juvenile offenders. The legislative history of SB 1391 includes specific recognition of, and an intentional effort to reverse, the changes to the treatment of juvenile offenders in

California that started in 1994 with the votes passing AB 560. (Exhibit H: Sen. Com. on Public Safety, Analysis SB 1391 (2017-2018 Reg. Session), pgs. 4-5; Exhibit H, pgs. 140-141.) SB 1391 was passed by a Legislature concerned about vast disparities between those sent to adult court instead of juvenile court for the same crimes. "Some localities send many youth to the adult system while others rely more heavily on the resources and tools available in the juvenile system. There are also disparities amongst the youth sent to adult court based on race. Youth of color make up nearly 92 percent of youth sent to the adult system." (Exhibit H, pg. 14.) The Legislature's authority to close the "door to the criminal courthouse" (*Hicks v. Superior Court, supra,* 36 Cal.App.4th at 1652) by returning the minimum age for adult prosecutions to 16 years old is no less powerful or constitutional than it was in 1994 when it acted with AB 560.

Thereafter, with Proposition 21 in 2000 and Proposition 57 in 2016, the voters changed, and then changed again, the procedures and specific considerations for transferring those under 18 to adult court, but the minimum age for adult court never changed. The fact that when voters approved Proposition

57 there were 14- and 15-year-olds being prosecuted as adults does not make it a voter-imposed mandate that 14- and 15-year-olds be eligible for adult court forever. Ballot materials for Proposition 57 included the language of Welfare and Institutions Code section 707 mentioning 14- and 15- year- olds as eligible for transfer (Exhibit C, pg. 70), but that was because the California Constitution requires that any initiative include the text of the entire statutory section to enable voters to understand the context of the proposed change. (Cal. Const., art. IV, § 9.) The mere inclusion of existing law in a ballot initiative does not transform existing state mandates into voter-imposed mandates. (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal. 5th 196, 218.)

Ultimately, neither Proposition 21 nor Proposition 57 enacted or specifically codified the provision that 14- and 15-year-olds could be subject to adult court jurisdiction. Since 1994, only AB 560 and SB 1391 have addressed the minimum age requirement for adult court in Welfare and Institutions Code section 707. Accordingly, it was well within the Legislature's power in 2018 to pass legislation returning the minimum age at

which a child may be prosecuted in adult court to 16 years of age, as was the practice historically. Therefore, there is no constitutional limitation on SB 1391's application in petitioner's case. Although this argument was made below, the *O.G.* Court's opinion eschewed any consideration of the history of juvenile law as "largely, irrelevant" (Appendix A: Opinion, pg. 4) and did not address this ground for upholding SB 1391.

D. Assuming *Arguendo* SB 1391 Amended Proposition 57, It Did So Lawfully Because It Satisfied Proposition 57's Amendment Clause

1. The Proposition 57 Amendment Clause Permits Changes to the Judicial Transfer Process

The California Constitution, Article II, section 10, subdivision (c), provides that the Legislature may amend an initiative statute by another statute if "the initiative statute permits amendment or repeal without the approval of the electors."

In Proposition 57, amendments to Sections 4.1 and 4.2 of Proposition 57, the "Judicial Transfer Process" section, are allowed, so long as "such amendments are consistent with and further the intent of this act by a statute that is passed by a

majority vote of the members of each house of the Legislature and signed by the Governor." The "Amendment" section of Proposition 57 starts with the phrase, "This act shall be broadly construed to accomplish its purposes." (Prop. 57, § 5; Exhibit C, pg. 73.)

2. Contrary to the ruling of the Court of Appeal, The *Pearson* Test Is Not Determinative Of Whether SB 1391 Is Constitutional

The Court of Appeal's ruling in *O.G.* applies a test this Court articulated in *People v. Superior Court (Pearson), supra,* 48 Cal.4th at 571, but did so in a manner that erroneously short-circuited the analysis of whether SB 1391 is constitutional. The *O.G.* Court found this Court's test in *Pearson* was "determinative" and, under the principles of *stare decisis,* Division Six felt bound to "require adherence to the *Pearson* rule." (Appendix A: Opinion, pgs. 2-4.) Coming to the abrupt conclusion that SB 1391 needs to be invalidated, the court below suggested that "If the Legislature wants to change the Proposition 57 rule, it must submit the issue to the electorate." (Appendix A: Opinion, pg. 5.) Not so. As noted, Proposition 57's amendment clause does not require a return to the voters if the change to the juvenile

transfer rules is consistent with and furthers the intent of Proposition 57. (Prop. 57, § 5.)

As discussed, *supra*, the *Pearson* test is helpful to determine whether a new law that relates to an area already covered by an initiative is an amendment. (*People v. Superior Court (Pearson), supra,* 48 Cal.4th at 571.) It does *not* determine whether an amendment complies with the terms of the Proposition's amendment clause.

At issue in *Pearson* was whether Penal Code section 1054.9, a post-conviction criminal discovery statute passed by the Legislature in 2002 was a lawful amendment to Proposition 115, passed by voters in 1990. A District Attorney argued it was not. As a first step, in order to determine if the new law was potentially an amendment that did not comport with Proposition 115's amendment clause, this Court set forth the test, "In deciding whether this particular provision amends Proposition 115, *we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits*." (*Id.* at 571, emphasis added.) The *Pearson* Court concluded that the new post-conviction discovery statute (Pen. Code, § 1054.9) did not

prohibit anything that Proposition 115 authorized, so Penal Code section 1054.9 was not an amendment to Proposition 115. The new law was upheld.

Here, Division Six asked the *Pearson* question and found that SB 1391 prohibited what Proposition 57 authorized, specifically, "[t]he language of Proposition 57 permits adult prosecutions and SB 1391 precludes such prosecution." (Appendix A: Opinion, pgs. 4-5.) Erroneously, however, the court prematurely halted its analysis there and failed to evaluate, as all of the other Courts of Appeal that have considered the issue have done, whether SB 1391 was nevertheless lawful because it satisfied Proposition 57's amendment clause. Proposition 57's amendment clause allows the Legislature to amend the "Judicial Transfer Process" described in the initiative with a majority vote, without going back to the voters, as long as the amendment is "consistent with and further the intent of this act." (Prop. 57, § 5.)

O.G.'s rejection of any possible amendment or change to the law that precludes what Proposition 57 permits renders Proposition 57's amendment provision a nullity. If the Legislature may only pass statutes that do not authorize what

Proposition 57 prohibits, or prohibit what Proposition 57 authorizes, then only legislative acts that do not qualify as amendments under the *Pearson* test are valid. This renders the amendment provision effectively useless, violating a basic principle of statutory interpretation and frustrating the will of the voters that supported Proposition 57 and the amendment clause that was contained therein. (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 937 ["[a]n interpretation that renders statutory language a nullity is obviously to be avoided. … "])

The dissenting opinions cited with approval in the *O.G.* Opinion suffer from the same defect. In *People v. Superior Court (T.D.), supra,* 38 Cal.App.5th 360, Justice Poochigian dissented from the opinion upholding Senate Bill 1391, finding that Proposition 57 intended "to preserve the prior practice of permitting some 14 and 15 year olds to be tried as adults." (*Id.* at 381.) In another dissenting opinion, Justice Grover found that the voters specifically intended that 14- and 15-year-olds be subject to transfer, prosecutors have discretion to seek transfer, and judges have discretion to order transfer. (*People v. Superior*

Court (S.L.), *supra*, 40 Cal.App.5th 114.) These dissenting opinions narrowly interpret Proposition 57's purposes to be identical to its specific provisions and render Proposition 57's amendment clause meaningless. Courts should interpret "statutes or written instruments so as to give force and effect to every provision and not in a way which would render words or clauses nugatory, inoperative or meaningless." (*Committee for Responsible School Expansion v. Hermosa Beach City School Dist.* (2006) 142 Cal.App.4th 1178, 1186, 1189.) Not all initiatives have amendment clauses (*Cf.* Compassionate Use Act of 1996, Prop. 215), and Proposition 57 does not permit amendment to any section, other than the juvenile transfer process. It was not an idle act for the voters to endorse the option for legislative amendment to the transfer process as part of Proposition 57. (Prop. 57, § 5.)

3. Five Courts of Appeal Have Found SB 1391 Constitutional Since It Is A Reasonable Construction That SB 1391 Comports with Proposition 57's Amendment Clause

In the context of interpreting a possible amendment to an initiative, as recently as 2017, this Court has recognized that: "We 'start[] with the presumption that the Legislature acted

within its authority' and uphold the validity of the legislative amendment 'if, *by any reasonable construction*, it can be said that the statute furthers the purposes' of the initiative." (*People v. DeLeon* (2017) 3 Cal.5th 640, citing *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256, emphasis added.)

The purpose and intent of Proposition 57, as stated in the Voter Guide materials was to:

1) Protect and enhance public safety,
2) Save money by reducing wasteful spending on prisons,
3) Prevent federal courts from indiscriminately releasing prisoners,
4) Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles and
5) Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court. (Exhibit C, pg. 69.)

Majorities of the other five Courts of Appeal thus far have undertaken the analysis of whether it can be reasonably said that SB 1391 satisfies the amendment clause of Proposition 57. The reviewing courts have properly reviewed ballot materials and historical context. (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 542 [discussing the need to look back on 150 years of "the appropriate role of government concerning

questions of race" when evaluating Proposition 209], *Amwest Surety Ins. v. Wilson, supra*, 11 Cal.4th 1243 [discussing persuasiveness of proposition's statement of purpose], see also *California Housing Finance Agency v. Patitucci* (l978) 22 Cal.3d 171 [discussing persuasiveness of historical context and ballot arguments].) Although focusing on different aspects of the law with different observations, all five Courts of Appeal determined that SB 1391 is lawful because it comports with the amendment clause. (*People v. Superior Court (Alexander C.), supra,* 34 Cal.App.5th 994; *People v. Superior Court (K.L.), supra,* 36 Cal.App.5th 529; *People v. Superior Court (T.D.), supra,* 38 Cal.App.5th 360; *People v. Superior Court (S.L.), supra,* 40 Cal. App.5th 114; *B.M. v. Superior Court*, *supra*, 40 Cal.App.5th 742.)

In sharp contrast, the *O.G.* Court briefly mentions only one stated purpose of Proposition 57, suggesting that SB 1391, "may contravene Proposition 57's express purpose to 'protect and enhance public safety,'" because "it may be rationally stated that SB 1391 does the opposite. It provides for juvenile treatment versus punishment for a person who commits murder or multiple

murders. It thus provides less protection for the public." (Appendix A: Opinion, pg. 5.) The *O.G.* Court's own independent assessment as to what is rational or good public policy, however, is not controlling as to whether SB 1391 furthers the purpose of Proposition 57. As this Court has observed, the role of the judiciary is not to "judge the wisdom of statutes." (*People v. Zapien* (1993) 4 Cal.4th 929, 954–955.)

In passing SB 1391, the Legislature made a policy decision that keeping 14- and 15-year olds out of the adult prison system would enhance public safety, based on research showing that youths tried as adults are "more likely to commit new crimes in the future than their peers in the juvenile system." (Sen. Com. on Public Safety Analysis of Sen. Bill No. 1391 (2017-2018 Reg. Sess.), as amended April 3, 2018, p. 4, Exhibit H, pg. 140.) Under the doctrine of separation of powers, "neither the trial nor appellate courts are authorized to 'review' legislative determinations." (*Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 962.) The policymaking role of the Legislature necessitates certain factfinding processes that are not intrinsic to the judicial function, but an "indispensable incident and auxiliary

to the proper exercise of legislative power." (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1219 [citation omitted].)

In light of the *O.G.* Court's ruling, which put it at odds with the five other Courts of Appeal, this Court should grant review to correct the erroneous application of *People v. Superior Court (Pearson), supra,* 48 Cal.4th 564, 571 and to settle an important question of law, namely, whether SB 1391 is constitutional.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Date: November 7, 2019

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

RICHARD B. LENNON
Executive Director

_____

JENNIFER HANSEN
Staff Attorney

Attorneys for Petitioner
O.G.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed petition is produced using 13-point Roman type including footnotes and excluding exhibits and contains approximately 4,074 words, as generated by the word count of the computer program used to prepare this brief.

DATED: November 7, 2019 Respectfully submitted,

_____
JENNIFER HANSEN

APPENDIX A:

Opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

O.G.,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

2d Crim. No. B295555
(Super. Ct. No. 2018017144
(Ventura County)

The Legislature cannot overrule the electorate. All power of government ultimately resides in the people. (See *People v. Kelly* (2010) 47 Cal.4th 1008, 1025; see also *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.) Under the guise of "amendment," an initiative may not be "annulled" by the Legislature. Consistent with precedent, we "jealously guard" the law as declared by the voters. We hold that Senate Bill No. 1391 is unconstitutional insofar as it precludes the possibility of adult

prosecution of an alleged 15-year-old murderer. (See *post*, at pp. 4-5.)

Fifteen-year-old O.G., despite his age, is deeply enmeshed in youth gang culture. On two separate occasions and in the company of gang cohorts, he is alleged to have been the actual murderer of two people who were in the wrong place at the wrong time. On one occasion, the victim was shot to death. On the other occasion, the victim was stabbed to death. The People of the State of California, by and through the Ventura County District Attorney, seek to try petitioner as an adult. Proposition 57, an initiative passed by the voters allows the district attorney, with the approval of the superior court, to try him as an adult. But effective January 1, 2019, Senate Bill No. 1391 (Stats. 2018, ch. 1012, § 1 (hereafter S.B. 1391)) prohibits even asking the superior court for such permission. Instead, notwithstanding a body count, the facts and circumstances concerning the commission of the offenses, or the background and history of the perpetrator, a 15-year-old alleged murderer must be dealt with in the juvenile court.

The trial court approved the district attorney's request to try petitioner as an adult because it determined, both legally and factually, that he should be prosecuted in adult court. It expressly found that the Legislature could not, consistent with California Supreme Court precedent, i.e., *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 (*Pearson*), alter the terms of the initiative. O.G. petitioned for extraordinary relief. We issued a stay of the trial and an order to show cause why the relief prayed for in the petition should not be granted.

Four court of appeal opinions have ruled that the Legislature could lawfully "amend" Proposition 57 because the

amendment was "consistent" with the goals of Proposition 57. (*People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994; *People v. Superior Court* (*K.L.*) (2019) 36 Cal.App.5th 529.) Contrary to the position taken by the Ventura County District Attorney, the Attorney General, as amicus curiae, contends that the extant court of appeal opinions were correctly decided and that the superior court order approving transfer to adult court must be vacated.

Recently, the Fifth Appellate District spoke to the identical issue in a 2 to 1 opinion, *People v. Superior Court* (*T.D.*) (2019) 38 Cal.App.5th 360; see also *People v. Superior Court* (*I.R.*) (2019) 38 Cal.Appl.5th 385. The majority in *T.D.* holds that S.B. 1391 lawfully amends Proposition 57 because it is "consistent with" and will "further" the intent of Proposition 57. As we explain, it is not consistent. It is inconsistent as a matter of law. We agree with the cogent analysis of the dissent authored by Acting Presiding Justice Poochigian. The *T.D.* majority at least recognizes *Pearson*, *supra*, 48 Cal.4th 564 but does not ask nor answer the straightforward determinative question. (See *post*, at pp. 4-5.)

And even more recently, the Sixth District spoke to the identical issue, again in a two to one opinion. (*People v. Superior Court* (*S.L.*) (Sept. 20, 2019, H046598) __ Cal.App.5th __ [2019 Cal.App. LEXIS 904].) The majority does not cite *Pearson* which we believe is determinative. We agree with the cogent analysis of the dissent authored by Justice Grover.

It does not matter whether treating a 15-year-old alleged murderer as a juvenile is wise or unwise. That is not a judicial call. What is a judicial call is whether the Legislature may prohibit by statute what the electorate has previously authorized

by initiative. We disagree with the four court of appeal opinions because, frankly, they did not ask nor answer the determinative question so aptly framed by Justice Chin for a unanimous Supreme Court in *Pearson*. Three of the four court of appeal opinions do not even cite to the *Pearson* case. Principles of stare decisis require adherence to the *Pearson* rule. (*Auto Equity Sales*, *Inc. v. Superior Court* (l962) 57 Cal.2d 450, 455.) In our view, insofar as S.B. 1391 precludes the possibility of adult prosecution of a 15-year-old murderer, it is unconstitutional. (Cal. Const., art. II, § 10, subd. (c).)[1]

The court of appeal opinions seem enamored with the history of how 15-year-old alleged murderers have historically been treated. This is, largely, irrelevant. It is the "overruling" of the People's latest expression of their wishes in 2016 which is the starting and ending relevant date. The court of appeal opinions analyze the enumerated purposes of Proposition 57. This is not irrelevant but the focus is on the trees and not the forest. The language of Proposition 57 permits adult prosecution and S.B. 1391 precludes such prosecution. The expressly stated goal of S.B. 1391 is to categorically preclude the possibility of adult court treatment of a 15-year-old for specified crimes including murder.

Pearson, *supra*, 48 Cal.4th at page 571 posits the determinative question: "In deciding whether this particular provision [S.B. 1391] amends Proposition [57], we simply need to

---

[1] (Cal. Const., art. II, § 10, subd. (c) states: "The Legislature may amend or repeal a referendum statute. The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."

ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits." Here, the superior court correctly ruled that the initiative authorizes the possibility of treating a 15-year-old alleged murderer as an adult and that S.B. 1391 precludes this possibility.

S.B. 1391 is a jurisdictional change in substantive criminal law/juvenile law. It is not merely procedural. This attempt to "overrule" Proposition 57 violates the well settled rule that the Legislature may not enact a law that thwarts the initiative process without the consent of the people. (E.g., *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026 (*Kelly*).) If the Legislature wants to change the Proposition 57 rule, it must submit the issue to the electorate. We "jealously guard" the law as declared by the voters. (*Kelly*, at p. 1025.)

We also observe that its declaration that S.B. 1391 "finds and declares that this act is consistent with and furthers the intent of Proposition 57 . . . " is entitled to no weight. (9 West's Cal. Legislative Service (Stats. 2018, ch. 1021, § 3, p. 6672 (S.B. 1391)).) This is a self-serving statement designed to bolster the attempt to overrule the electorate. Whether the act can be so construed presents a legal question for the judiciary.

Finally, in our view, S.B. 1391 may contravene Proposition 57's express purpose to "protect and enhance public safety." It may rationally be stated that S.B. 1391 does the opposite. It provides for juvenile treatment versus punishment for a person who commits murder or multiple murders. It thus provides less protection for the public. And let us not forget that just because the People ask for approval to try a 15-year-old as an adult does not inexorably mean that the superior court will agree. Who

better than a superior court judge to consider the entire evidentiary picture and background of the 15-year-old to make this determination?

The stay order previously issued by this court is vacated. The order to show cause is discharged. The petition for extraordinary relief is denied.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

GILBERT, P. J., Concurring.

I am compelled to agree with my colleagues and those in other districts who have written dissents that the Legislature overstepped its boundary in drafting Senate Bill No. 1391. The legislation contradicts the language of Proposition 57.

My colleagues in other districts who have upheld the legislation offer well-intentioned reasons based on what they see as the voter's intent. I am reminded of what is reputed to be Justice Holmes's dictum: His obligation as a judge is to look at what the Legislature (here the People) said, not what it (they) meant.

However reasonable the views of my colleagues in other districts concerning the voter's intent in Proposition 57, the words of Proposition 57 contradict that view. Our oath of office requires us to follow the clear language of the proposition absent a constitutional infirmity. Here the constitutional infirmity is in Senate Bill No. 1391.

Separation of powers is a guiding principle of our democracy. We must preserve this safeguard whatever our views about the wisdom of the proposition or the legislative enactments concerning that proposition.

If we fail to adhere to this analysis of legislation, we follow a path that can lead to unforeseen consequences in the interpretation of future legislation. When the shoe is on the other foot, one may get a bunion.

CERTIFIED FOR PUBLICATION.

GILBERT, P. J.

Kevin J. McGee, Judge

Superior Court County of Ventura

Richard Lennon, Executive Director, Jennifer Hansen, Staff Attorney under appointment by the Court of Appeal and Willard P. Wiksell for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Thomas S. Patterson, Assistant Attorney General, Tamar Pachter and Nelson R. Richards, Deputy Attorneys General, as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Gregory D. Totten, District Attorney, Michael D. Schwartz, Chief Assistant District Attorney, Tate McCallister and Michelle Contois, Deputy District Attorneys for Real Party in Interest.

APPENDIX B:

Modified Order

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

O.G.,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

2d Crim. No. B295555
(Super. Ct. No. 2018017144
(Ventura County)

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

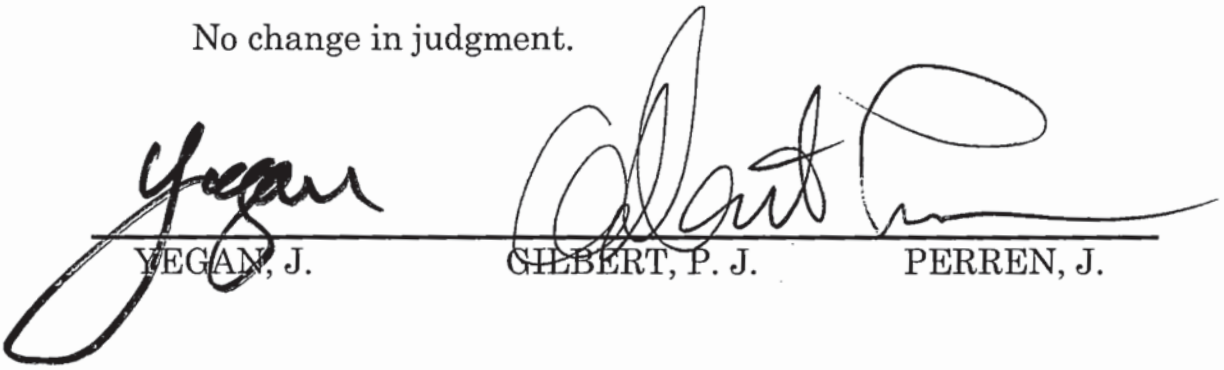
THE COURT:

It is ordered that the opinion filed herein on September 30, 2019, be modified as follows:

1. On page 2, second paragraph, delete the first full sentence beginning with: "The trial court approved the district attorney's request" and replace with: "The trial court, over O.G.'s objection, granted the district attorney's motion to refer the case to the probation department for a transfer report to address O.G.'s suitability for juvenile court treatment and/or transfer to

adult court for prosecution. (See former Welf. & Inst. Code, § 707, subd. (a)(1).)"

No change in judgment.



YEGAN, J. GILBERT, P. J. PERREN, J.

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On November 7, 2019, I served the within

PETITION FOR REVIEW

in said action, by emailing and e-filing through Truefiling a true copy thereof to:

Xavier Becerra, Attorney General
docketingLAawt@doj.ca.gov

Second District Court of Appeal, Division 6
2d1.clerk6@jud.ca.gov

and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California:

Honorable Kevin J. McGee
4353 E. Vineyard Avenue
#122
Oxnard, Ca 93036

Attorney Willard Wiksell
674 County Square Drive
Suite 301
Ventura, CA 93003
(805) 656-3163

Lisa Lyytikainen, Deputy District Attorney
800 South Victoria Avenue
Ventura, CA 93009
(805) 654-2500

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 7, 2019, at Los Angeles, California.

_____
JACQUELINE GOMEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **O.G. v. The Superior Court of Ventura County**
Case Number: **TEMP-EQB7O77C**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Jennifer@lacap.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	B295555_PFR_OG

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jennifer Hansen California Appellate Project, Los Angeles	Jennifer@lacap.com	e-Serve	11/7/2019 11:18:05 AM
Xavier Becerra, Attorney General	docketingLAawt@doj.ca.gov	e-Serve	11/7/2019 11:18:05 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/7/2019
Date

/s/Jackie Gomez
Signature

Hansen, Jennifer (249733)
Last Name, First Name (PNum)

California Appellate Project, Los Angeles
Law Firm